

**Prepared Remarks of U.S. Attorney Preet Bharara
E. Lawrence Barcella Jr. Memorial Address
ABA White Collar Conference
March 1, 2012
Miami, Florida**

Let me start by talking about some of what is going on in our quiet corner of the universe in the Southern District of New York.

Now, I had thought I would talk about insider trading – as that is all anyone seems to care about. But then I saw that on Monday the FBI recruited the Gordon Gekko – Michael Douglas – to do a public service announcement, so the insider trading problem seems to have been solved.

So I don't plan to talk about that. In fact, there is a reasonable argument that insider trading gets disproportionate attention from the public and the press.

Believe it or not, we have other work – we even have other work in the white collar area, and lots of it.

One area I want to mention is something that might seem odd, given that this is a white collar crime conference. It is our burgeoning work going after fraud through civil lawsuits. Since it's a bit new and still developing both in my office and throughout the rest of the Justice Department, I thought it might be worth conveying some of my views about that work and our approach to it.

I have found, by the way, it is the same lawyers who appear in those cases; they often have a potential criminal component.

The Civil Frauds Unit was established two years ago under leadership of Andrew Schilling, who was the Chief of the Civil Division at that time, and it was dedicated exclusively to civil fraud.

Not meant in any way to compete with or overlap with what the SEC does. In fact, the SEC has established a remarkable record of civil enforcement of the securities laws in the last several years, particularly in cases related to the financial crisis. And under the tremendous leadership of enforcement division chief Rob Khuzami, that success will continue.

But we began to focus on underutilized statutes like the False Claims Act and FIRREA and the civil injunction statute – with the deliberate purpose of ferreting out financial fraud, among other things.

We view our civil enforcement efforts in the white collar realm not as something radically different from our criminal efforts in the same area.

Rather, we view both our civil and criminal efforts as part of an overall program of law enforcement.

Here's an overview of what we've done recently:

- In the less than two years since the establishment of the Civil Frauds Unit, we have filed 22 civil fraud lawsuits and reached settlements or obtained judgments totaling nearly \$450 million.
- Those 22 lawsuits included claims against 32 entities and 21 individuals, including the CEO [and executive vice president] of one of the nation's largest mortgage lenders [and the former CEOs of a major health care provider].
- We have prioritized financial fraud enforcement, and have brought more civil fraud suits against major financial institutions than any other U.S. Attorney's Office in the country, with suits in the past year alone against Deutsche Bank, Allied Home Mortgage, CitiMortgage, Bank of New York Mellon, and Flagstar Bank.
- We brought Justice Department's first civil mortgage fraud lawsuit against a major Wall Street financial institution following the financial crisis (United States v. Deutsche Bank, et al.) and the Department's first FIRREA civil penalty lawsuit against a major Wall Street financial institution (United States v. Bank of New York Mellon).
- Our Civil Frauds Unit also recently obtained one of the largest False Claims Act recoveries against a municipality in history, with its \$70 million health care fraud settlement with the City of New York (United States ex rel. Feldman v. City of New York).
- We have made aggressive use of FIRREA's civil penalty provisions, as well as the civil fraud injunctive statute, 18 USC 1345, both to stop on-going financial fraud and to obtain reform of corporate business practices (see Cambridge, Bank of NY).

Now, those are some of the things we've done, but I want to speak more directly about our philosophy of civil fraud enforcement.

As I mentioned, we view both our civil and criminal efforts as part of an overall program of law enforcement.

Generally speaking, people too often think of civil lawsuits as being all about the money and the money alone – simply about making parties whole. More cynically, people also too often think of civil lawsuits as thinly-veiled attempts at financial extortion.

Because of the risk inherent in litigation, the danger of ongoing damage to reputation, and the desire for repose, both plaintiffs and defendants – with little pretense for having any stomach for a protracted court fight – often agree on a dollar figure and go their merry way.

And no public interest is vindicated – whether it is an interest in deterrence, reform, truth, or public understanding. And that is more than fine in suits between purely private litigants.

When the government sues, I think, it is different. The government should never casually sue an individual or a financial institution, for that matter. And should never be seen to be doing so.

Though liberty may not be at stake in a civil suit, reputations and livelihoods most certainly are. Indeed, it is no exaggeration to say that the very survival of a business can be at stake in government enforcement litigation. And so the government must take enormous care – just as in criminal cases – before bringing even its civil powers to bear.

Moreover, when the government sues in its capacity as a law enforcement agency, it is not only about the money.

As we tell our civil fraud folks, they are not working for a collections agency, and the amount of money collected is not the metric by which we judge the success of our efforts. We tell our civil fraud prosecutors that they are engaging in a form of law enforcement; they are not out simply to collect money but to seek justice, with all the responsibilities and objectives that lofty goal entails.

The United States Attorney's Office has two arms to hold individuals and institutions accountable for wrongdoing – one criminal and one civil, and it is not smart to fight with one arm behind your back.

And because we approach civil suits as another tool of law enforcement, we are guided by many of the same principles that govern criminal prosecution:

- we are seeking restitution for victims;
- we are seeking to deter misconduct and send a message to others;
- we are seeking to punish wrongdoing and the actual wrongdoers;
- we are seeking to change behavior and reform institutions;
- and we are seeking to improve public understanding of the truth.

If all we did in every case was investigate, negotiate, and strike a big monetary deal that includes a denial of misconduct, we serve, at best, only the goal of recovering the cash, and hopefully for the victim.

But it is possible that we sacrifice the other goals.

And in the process, we can breed cynicism among the public who think it's all a big joke as rich companies pay a cost of doing business to avoid any responsibility or accountability.

It's for all these reasons that we should sue with the goals of deterring and punishing and shining a spotlight and changing behavior and recovering for victims.

All this may seem to suggest that the best way to serve these goals civilly is through a suit, which includes individual wrongdoers, followed by discovery and a public trial, verdict, and judgment.

But that is not always practical or sensible. And we will of course settle if we can reasonably accomplish these same objectives through settlement.

The bottom line is this: as it is said, justice must not only be done, it must be seen to be done. That is true in the civil context as well as the criminal context.

Those settlements should therefore not undermine public confidence or sacrifice these other goals just to maximize monetary recovery. If we can get a company to acknowledge responsibility for its wrongful conduct and commit to stopping it and prevent it from happening again, it makes sense to do that.

This is a very long way of saying that the defense bar should have an increasing expectation of a few things.

First, there should be an increasing expectation that in civil suits brought by our office, we will seek admissions about misconduct and wrongdoing.

And that is what our recent track record has suggested. Our Civil Frauds Unit has required certain defendants in fraud cases – including two major financial institutions in the past month alone – to admit and accept responsibility for their misconduct in the settlement agreement.

Second, the defense bar should have an increasing expectation that we will bring suits promptly after investigation and not always settle simultaneously, as has often been the practice.

In the past, investigations in some qui tam civil fraud cases have been known to take years.

Those investigations were often followed by extensive, some would say endless, pre-suit settlement negotiations, all with a goal of filing and settling the case on the same day.

While avoiding the time and expense of protracted and costly litigation is certainly a worthwhile goal, and one we share, some might say that it is more in the defendant's interest than the government's to avoid litigation.

Particularly in civil fraud cases, publicly announced lawsuits, the discovery process, public trials, and jury verdicts serve a useful function of shining a spotlight on bad conduct and bad practices and deterring future misconduct. And people should understand that our civil AUSAs – like our criminal prosecutors – will not shy away from trial.

While settling cases of course preserves limited government resources, in my view it is worth devoting resources to the pursuit of fraud cases. And we have done so.

In my office, you will see that civil fraud investigations are moving faster, our settlement negotiations are shorter, and we are filing more lawsuits without simultaneous settlements.

We are fully prepared to sue without settling if we think that settlement negotiations would be futile or unduly protracted.

The lawsuits we file are also more likely than in prior years to name not only entities but individuals as defendants. When we do settle, you should expect that in appropriate cases we will insist on terms that fully vindicate the public interest, that make sure the wrongful conduct has stopped, and that require defendants to admit and accept responsibility.

So that, in a nutshell, is how we think of our civil white collar practice.

Having said all this, I don't want to leave a group with the impression that we will pursue civil enforcement of financial fraud to the exclusion of criminal prosecution.

As our record shows, nothing could be further from the truth. As you all know, bringing a civil case does not preclude a parallel or subsequent criminal case, just as bringing a criminal case does not preclude a parallel or subsequent civil case – and most of our fraud enforcement will continue to be criminal.

The point I want to make here today is simply this: that we also have at our disposal powerful and effective civil enforcement tools, tools that in the past we have not used to their full potential in this area, and we have no intention of fighting financial fraud with one powerful arm tied behind our backs.